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United States

OCTOBER TERM, 1944

No. 624

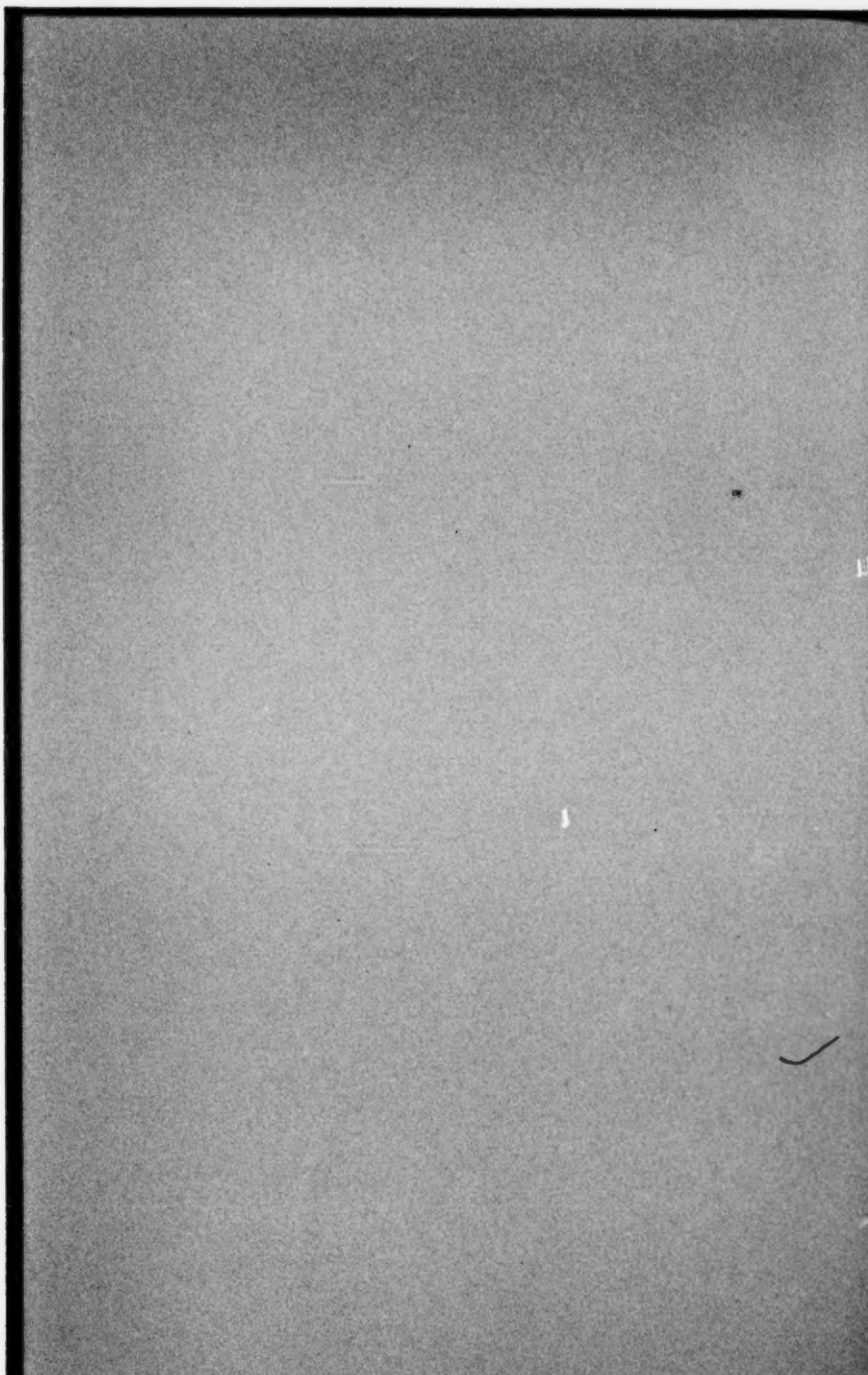
H. M. LORBER, ROY R. DEMPSTER, J. R. MASON, ARTHUR LORBER, FRANCES V. WHEELER, GILBERT MOODY, J. B. BLOOM, as Trustee of the Bloom Company, a Trust Estate, and STANLEY W. LANDIS,
Petitioners,

vs.

VISTA IRRIGATION DISTRICT,
Respondent.

BRIEF OF RESPONDENT OPPOSING ISSUANCE OF WRIT OF CERTIORARI

GLEN H. MUNKELT,
H. G. SLOANE,
Counsel for Respondent.



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BRIEF OF RESPONDENT OPPOSING ISSUANCE OF WRIT OF CERTIORARI

The courts of the Ninth Judicial Circuit of late years have had wide experience in applying the provisions of the Bankruptcy Act to compositions of bonded indebtedness of California irrigation districts. Distinguished counsel for the petitioners herein has

been active in many of these cases in the effort to procure interference by the Supreme Court of the United States in the pattern of application of law and fact arrived at by the United States Circuit Court of Appeals for the Ninth Circuit. This court has, however, repeatedly expressed its satisfaction with the decisions covering this particular field by denying certiorari.*

The present petition offers no new propositions of law as distinguished from questions of fact which petitioners seek to review. Respondent Vista Irrigation District opposes issuance of a writ of certiorari on this account and because its affairs have already been disrupted by repeated appeals by the petitioners since rendition of the interlocutory decree March 26, 1941.

PETITIONERS CHALLENGE CONCLUSIONS OF FACT BASED ON CONFLICTING EVIDENCE

Under their argument, 3rd point, 4th point, 5th point, and to some degree under 6th point, petitioners present their views of the evidence and the inferences and conclusions which they feel should be drawn therefrom.

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*West Coast Life Ins. Co. v. Merced Irr. Dist., 114 Fed. 2d 654; Certiorari denied 61 S. Ct. 441, 311 U. S. 718, 85 L. Ed. 467;

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McDonald v. Banta Carbona Irr. Dist., 123 Fed. 2d 968; Certiorari denied 62 S. Ct. 1034, 316 U. S. 668, 86 L. Ed. 1743.

Rather than to restate here the basic facts, Respondent refers to the excellent summary thereof made by the Circuit Court of Appeals and appearing in the published reports, *Lorber v. Vista Irrigation District,* 127 Fed. 2d 628 and 143 Fed. 2d 282.

These findings are challenged by petitioners along two basic lines: (1) That the evidence touching the financial and economic condition of the district does not support the finding of insolvency; (2) that the plan of composition is not a fair one in the light of such conditions.

After hearing numerous witnesses and examining voluminous accounts, the trial court found that the District was unable to meet its obligations as they mature. This finding was challenged on appeal, but the lower court's conclusions were fully sustained. *Lorber v. Vista Irr. Dist.,* 127 Fed. 2d 628 (10, 11, p. 637). On taking further evidence, the trial court held that the "ability of the District to pay" amounted to 55c on the dollar. This was vigorously challenged on a second appeal and insolvency was again argued. Again the Circuit Court upheld all findings of the trial court. *Lorber v. Vista Irr. Dist.,* 143 Fed. 2d 282.

Petitioners now propose that this court take upon itself the burden of reviewing and weighing the evidence appearing in volumes of statistics and accounts. At most it would be found that differing conclusions of fact might be drawn and abundant evidence would be discovered to support the conclusions drawn by the courts below.

STATE DECREES WERE PROPERLY DISREGARDED BY THE BANKRUPTCY COURT

Under First Point and Second Point petitioners seek to present a real question of law, their proposition being that where the state courts have rendered judgments requiring payment on account of district bonds, the relief offered such districts under the Bankruptcy Act is no longer available to them.

We apprehend that there are two fundamental answers to this:

First: *Res judicata* against all creditors who are concerned in a bankruptcy proceeding cannot arise from a proceeding on the part of any one of them alone against the debtor.

Second: A state judgment requiring payment of a debt has no higher standing in a court of bankruptcy than the debt itself (except for removing question of its validity, etc.). Thus a state decree requiring an irrigation district to collect funds and pay interest has no greater sanctity than a money judgment enabling collection on execution.

Obviously, the purpose of the Bankruptcy Statute may not be nullified by efforts of a creditor to collect his obligation in a state court.

CIRCUIT COURT DECISIONS ARE NOT IN CONFLICT

There is no conflict in the law as laid down by the Ninth Circuit Court decisions and that in *Texas v. Tobasco Consolidated School District,* 132 Fed. 2d 62, 133 Fed. 2d 196, 142 Fed. 2d 58. The factual backgrounds are distinguishable.

The cases decided upon appeal in the Ninth Circuit Court and tendered to the Supreme Court on petitions for certiorari (all denied) abundantly reflect the pattern of California irrigation district RFC financing. It is definitely held that no exchange of bonds is involved.

> *West Coast Life Ins. Co. v. Merced,* 144 Fed. 2d 654 (p. 667).

The Texas plan called for an outright "exchange" of bonds according to the definition adopted by the Fifth Circuit Court.

> *Texas v. Tobasco,* 133 Fed. 2d 196.

We take it that petitioners' implication (Brief, p. 22) that they are to get only 55c on the dollar, where RFC gets 100c in bonds, is inadvertent. Of course, the plan does not take into consideration what any bondholder may have originally paid for his bond. Adjustment is based in every case upon the face value of the bond.

THE PLAN HAS BEEN IN NO RESPECT ABANDONED BUT HAS BEEN SUBSTANTIALLY PERFORMED.

Petitioners indulge in blowing hot and blowing cold. Under their Fifth Point they argue that the plan provides delivery of new 4% bonds to RFC in exchange for old bonds, whereas petitioners are required to take their equivalent in cash. Yet, under their Sixth Point they demonstrate that RFC gets no new bonds, either 4% or otherwise!

The simple truth of the matter is that, after the plan was approved under the interlocutory decree, the District proceeded to carry it out to the best of its ability. In the succeeding interim petitioners enjoyed an appeal, a new trial on a single issue, an affirmance of the interlocutory decree and an unsuccessful appeal from that. No mandate ever issued suspending the plan or deferring its performance.

Performance has been completed in all respects except as relate to petitioners' bonds. RFC, the owner of the bulk of the bonds, was paid in cash 55c on the dollar (plus certain interest accruals), as the plan calls for. Petitioners' money awaits their acceptance on precisely the same terms and exactly in accordance with the plan.

We fail to grasp the logic by which it is claimed that such part performance of the plan operates as abandonment of it and renders the unperformed portion a moot subject!

If, on termination of this litigation, petitioners do not see fit to surrender their bonds and take payment on the same basis as did RFC, all that remains to be done is for the District to deposit their money in escrow pursuant to the provisions of the plan for recalcitrant bondholders, report the fact to the court and take the final decree.

OPPORTUNITY, SUBSEQUENTLY ARISING, TO CARRY OUT THE PLAN WITH CHEAPER MONEY, DOES NOT VITIATE THE PLAN.

Substantially the only new matter which petitioners seek to bring before this court, (beyond what has heretofore been offered on petitions for writ of certiorari), is the fact that Vista Irrigation District, after its plan had been accepted by bondholders and approved by the court, was able to obtain funds for refinancing at a rate of interest smaller than was originally contemplated. This was a "break" resulting from the delay of persistent litigation on the part of petitioners. Money became cheaper and the adoption and approval of the plan gave a more attractive appearance to the District's future.

The plan, as adopted and approved by the court, called for payment to each bondholder of 55c on the dollar, plus certain interest accruals. This was held to be a fair plan and commensurate with the ability of the District at the time.

If subsequent efforts had made money more expensive and had cast a more discouraging shadow on the future of the District, petitioners could not have been called upon to take any less in settlement than the 55c agreed upon. On the other hand, petitioners are in nowise prejudiced by the fact that the burden assumed by the District in order to pay them off has been slightly lightened. If any one could complain it would be RFC, which had something in the nature of an option to take the new bond issue. However, it does not complain.

Petitioners' position is no better or no worse than it would have been if some good angel had donated to Vista Irrigation District a sufficient sum to pay out under the plan and set the District on its feet again. In any event, whether with money procured from RFC or money procured from private bankers or money procured by donation for the purpose, petitioners are in position to receive for their old bonds exactly what the other bondholder, RFC, received for its old bonds and exactly in the amount specified in the plan.

We respectfully submit that there is neither occasion for nor subject matter appropriate to review by the Supreme Court of the United States.

GLEN H. MUNKELT,
H. G. SLOANE,
Counsel for Respondent
Vista Irrigation District.